No. 95-719

(7)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Should a federal appellate court exercising diversity jurisdiction apply a federal or state standard of review to the appeal of a district court's denial of a Rule 59 motion to set aside a jury award as excessive?

2. Absent trial error, does the Seventh Amendment's "reexamination clause" permit federal appellate review of facts found by a jury?

3. If federal appellate review of jury fact findings is permitted at all by the Seventh Amendment, what is the standard of review?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption on the cover of this brief.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit reversing the District Court (Pet. App. 1a-10a) is reported at 66 F.3d 427. The order of the United States District Court for the Southern District of New York denying defendant's motion under Fed. R. Civ. P. 59 to set aside the jury's verdict and order a new trial (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 12, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on November 3, 1995, and was granted on January 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides in pertinent part:

> [N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

CBS News correspondent William Gasperini commenced this diversity action in the United States District Court for the Southern

District of New York against the Center for Humanities, Inc. (the "Center"), because the Center lost 300 of Mr. Gasperini's original and irreplaceable slide transparencies.

The Center approached Mr. Gasperini to use his slides for a video it was producing entitled *Conflict in Central America*. App. 46, 50. Mr. Gasperini's photographs were solicited because he was the only photographer the Center knew who had a body of work on war in Central America. App. 50. After being contacted by the Center, Mr. Gasperini delivered 300[1] original, irreplaceable slide transparencies which the Center used to make the video. App. 61, 68, 196. After the Center made the video, it lost the transparencies. App. 60-61.

The lost transparencies represented the culmination of Mr. Gasperini's work on Central America, collected over a seven-year period and covering many of the critical events in Central American history during that period. App. 172-73. Many of the photographs were taken at great risk of bodily injury and death. App. 163-68. Others were taken in remote regions of the Central American jungle and mountains. App. 169-73. All of the photographs depicted images and scenes impossible to recreate.[2] App. 177.

After trial began, the district judge granted Mr. Gasperini's motion for a directed verdict on the issue of liability. The only issue submitted to the jury was an assessment of damages. App. 48, 60-61. The trial lasted three days. In addition to factual and expert testimony from eight witnesses, significant visual exhibits

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[1] After Mr. Gasperini's delivery of these 300 slides, his mother delivered an another ten slides to the Center. App. 196. Apparently, because these slides were not professionally edited, the jury did not award damages for their loss.

[2] Examples of the 300 lost transparencies included photographs taken by Mr. Gasperini while he was held hostage by guerilla fighters in the Nicaraguan jungle, App. 164-69, and while he was under fire from helicopter gunships in El Salvador, App. 167. They included photographs of major historical figures, App. 162, as well as scenes depicting the aftermath of war. App. 163-165.

and documentary evidence were admitted and reviewed by the jury and judge during the course of trial.

1. The Evidence At Trial

At trial, the jury and judge heard extensive testimony regarding Mr. Gasperini's background, training and experience as a foreign correspondent and photojournalist. In addition to work with CBS News and the Christian Science Monitor, Mr. Gasperini has worked for a variety of other major media, including United Press International, the Canadian Broadcasting Corporation, Reuters, the Oakland Tribune and the Kansas City Star. App. 137.

Mr. Gasperini has traveled the world as a foreign correspondent and photojournalist, having taken photographs on every continent, save Australia and Antarctica. He speaks Portuguese, French, Russian, English and Spanish. App. 139. Most of his career has been spent in Central America. App. 172. His photographs have been used in newspapers, magazines, films, professional slide presentations and in multi-media projects such as CD-ROM. App. 146-48. Some of his lost work from Central America previously had been displayed in galleries. App. 200.

Mr. Gasperini earned approximately $10,000 from photography while in Central America. App. 178, 181-82, 192, 194-95. He explained, however, that during his time there he was collecting photographic material, rather than attempting to market it extensively. App. 150-51. Mr. Gasperini testified about his plans to publish a book containing his best photographs from Central America, and to place them with a stock agency for marketing. App. 175. Mr. Gasperini's plans concerning his book were confirmed by respondent's expert. App. 272.

The jury was also presented with extensive evidence demonstrating the superior quality of Mr. Gasperini's photographs, his technical excellence as a photojournalist and the uniqueness of the images he captured. William Kuebler, an award winning photographer and a photo editor for Gannett Newspapers ("Gannett"), testified that Mr. Gasperini was "an excellent photographer" whose

photographs were "every bit as good, if not better, than the photographs that we've taken [at Gannett]." App. 208. Mr. Kuebler has worked with hundreds of photographers in his career and had a 25-year history of familiarity with Mr. Gasperini's work. App. 207-208. In support of his opinion regarding Mr. Gasperini's work, Mr. Kuebler discussed Mr. Gasperini's selective eye as a photographer, the composition and subject matter of Mr. Gasperini's photographs and the access Mr. Gasperini obtained to dangerous or remote areas, which produced unique photographs. App. 208-209.

Mr. Kuebler's testimony on the quality of Mr. Gasperini's work was amply supported by other witnesses. Jane Kinne, Mr. Gasperini's principal expert on valuation, described Mr. Gasperini as a "first class professional photojournalist." App. 216. Susan Green, a consultant of the Center and producer of *Conflict in Central America,* the video produced from Mr. Gasperini's photographs, described his lost photographs as "wonderful." App. 65. Even respondent's President, William Goodman, testified that he was "quite pleased" with the quality of Mr. Gasperini's photographs. App. 122.

The jury was also presented with substantial visual exhibits and documentary evidence. First, the jury was provided with a meticulous description -- in writing, augmented by Mr. Gasperini's testimony -- of the content of each of the 300 lost photographs and the circumstances under which each was taken. Pl. Ex. 31; App. 203, 204; 427-445. Second, the jury saw visual exemplars of Mr. Gasperini's work from remote regions of Tibet, Nepal, India, Pakistan, Sri Lanka, the Gulf War and the Soviet Union so that the jury could further assess the quality of his work and his technical expertise as a photojournalist. Pl. Ex. 18; App. 153-157. Finally, the jury saw *Conflict in Central America,* the video produced by the Center which contained 110 of the 300 photographs lost by the Center. Pl. Ex. 10; App. 46-47.

Jane Kinne, a national expert in valuing photography who has appraised photography for estates, museums, art galleries, universities and Sotheby's, Inc., provided extensive, detailed

testimony explaining how the valuation of lost photography is done in general and how she valued Mr. Gasperini's work.[3] She explained how a photograph is made and the distinction between a photographer and a photojournalist. App. 217-218. She described how knowledge of a region, its culture, history and language bear directly on the photographer's ability to obtain unique images. App. 217. She described the critical process of editing, App. 218, 219, and how she tested Mr. Gasperini's photo editing skills. App. 216, 227-28. She explained the criteria to determine the value of original color transparencies,[4] App. 227, and how photographs generate income for the photographer and his estate over the lifetime of the copyright. App. 228-29. On cross-examination, she testified that Mr. Gasperini's work had future value in the editorial market and the more lucrative advertising market. App. 236, 243. Finally, she testified that there was a continuing demand for photographs on Central America. App. 239. Based on review of all information available to her, Ms. Kinne placed an average value of $1500 each for the lost transparencies. App. 228.

Ms. Kinne's testimony was supported by Robert Zentmeier, a witness on market value who was subpoenaed at trial by Mr. Gasperini. Mr. Zentmeier is the president of Photo Researchers, a major photo stock agency which maintains an inventory of approximately one million slides. App. 70. Mr. Zentmeier

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[3] Ms. Kinne's other credentials include: a Master's degree from Columbia University in audiovisual education; 47 years in the photographic industry; 30 years at Photo Researchers, one of the largest stock agencies in the world, including 12 years as its president; president of the American Society of Picture Professionals (ASPP); 30 years as a sustaining member of the American Society of Magazine Photographers (ASMP); and a member of the legal and evaluation committees of ASPP and ASMP. App. 211-215.

[4] As Ms. Kinne explained, the criteria for valuing photographs involves, *inter alia*, the technical excellence of the photograph, aesthetic value (or the particular eye of the photographer), the subject matter, the value of the subject matter, the way the subject matter has been treated and the value of a particular photograph in relation to a whole body of work, particularly in the case of photojournalism where the photojournalist is trying to tell an entire story through the use of an image. App. 227.

testified that: (i) the sales potential of a photograph does not diminish with the death of the photographer, *id.*; (ii) fees for the use of an image can be as high as $30,000, App. 73; (iii) historic photographs remain in stock indefinitely and their use recurs often after many years, App. 75-76; (iv) repeated use is common in the industry, *id.*; and (v) prior sales history of a photographer does not affect the reproduction fee. App. 76-77. Thus, both Ms. Kinne and Mr. Zentmeier established that fees for the one time use of a single transparency could be as high as tens of thousands of dollars. App. 73, 228. As Ms. Kinne explained, after multiplying those fees through "the life of the copyright, . . . the $1500 becomes a very fair and reasonable figure." *Id.*

The Center called only one witness at trial, Gideon De Margitay. Mr. De Margitay described himself as a "buyer of photography" and did not have Ms. Kinne's background in appraisal or valuation of photographic material.[5] App. 268, 270. Mr. De Margitay stated that if he were putting together a book on Central America, he would have selected 47 of the 300 lost photographs because the others would have been of "no particular interest" to him. App. 257-58. Ultimately Mr. De Margitay could not place a value on all of the lost photographs, App. 260, but stated that he would pay up to $250 for the single use of each of those that were of interest to him. App. 258.

Significantly, Mr. De Margitay conceded a number of points that supported the testimony of Mr. Gasperini's witnesses: (i) a photographic image generates income over the owner's lifetime and fifty years beyond and consequently Mr. Gasperini's pictures would have earning power over the next 94 years, App. 268-69; (ii) demand for historical photographs recurs over time, App. 271; and (iii) historical photographs can be used in many different contexts including use in textbooks, educational videos, magazines and books. *Id.*

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[5] Mr. De Margitay did not belong to any professional photographic organization, nor sit on any committees for valuation. His experience was in production, and he worked as a consultant, primarily for Time, Inc. App. 249, 262.

2. The Jury Charge And Verdict

The Honorable Charles L. Brieant instructed the jury that in assessing the value of Mr. Gasperini's work, they should consider: "the ability and experience and knowledge of the photographer," the "reputation of the photographer or photojournalist," the "content and subject matter of the lost slides," the "extent and nature of the demand in the market for the use of pictures of this particular type and content," the "prior licensing fees collected and the prior experience of the [photographer] in connection with his slides," the "extent and nature of his efforts to exploit the economic value of [the] transparencies" the "potential competition or alternative sources of similar or substitute photography," the "potential use of the slides for the purposes of writing a book," and "the value of the slides . . . over the life of the copyright." App. 304-306.

After the evidence was submitted and following the trial judge's charge, the jury deliberated and returned a verdict awarding Mr. Gasperini $450,000. App. 313.

3. The Denial Of Respondent's Rule 59 Motion

After the verdict, the Center moved for a new trial pursuant to Fed. R. Civ. P. 59(a), arguing that Judge Brieant erred in admitting certain evidence, and that the jury's award was excessive. After briefing, Judge Brieant, who presided over the case from its inception, denied the motion. Pet. App. 11a-12a.

4. The Second Circuit's Decision

Following denial of the Rule 59 motion, the Center appealed to the Court of Appeals for the Second Circuit. The Second Circuit expressly rejected the Center's argument that evidence about the industry standard was admitted erroneously. Pet. App. 4a-5a. Moreover, the Second Circuit made no finding that Judge Brieant had erred in instructing the jury, nor that the jury was influenced by passion or prejudice, nor that the trial proceedings were defective in any other respect. Nevertheless, the Second Circuit overturned the jury's verdict as excessive, and ordered a new trial

unless Mr. Gasperini would remit all but $100,000 in damages. Pet. App. 9a.

Remarkably, the Second Circuit held that, in a diversity action, not only does state substantive law apply, but state law also provides the appellate standard for reviewing the jury's findings of fact. Pet. App. 8a. Under the New York State standard of review, the Appellate Division -- which is empowered to make *de novo* findings of fact -- "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995), *cited in* Pet. App. 8a. The Second Circuit conceded "[t]his standard accords less deference to the jury's award than does the traditional [federal] standard," which it described as a "shock the conscience" standard. *Id.*

Thus, apparently viewing itself as unbound by the Seventh Amendment or what it perceived as the federal standard, the Second Circuit proceeded to recharacterize and re-weigh the evidence presented to the jury. Its first step was to jettison without explanation almost all the factors the jury had been instructed to consider in determining damages, announcing that damages would be based instead only on "uniqueness"[6] and "the earning level of the photographer." Pet. App. 4a. Moreover, in a glaring omission, the Court of Appeals stated that the jury was not "able to see the lost transparencies themselves," Pet. App. 9a, without mentioning that the jury had seen a videotape reproduction of 110 of the transparencies. It was only the appellate panel -- not the jury or Judge Brieant -- who had taken it upon themselves to value the transparencies without ever seeing any reproductions of them. Having mischaracterized both the jury's instructions and the

[6] The Court of Appeals defined "uniqueness" so as to turn almost entirely on whether other photographers were present when a photograph was taken. Its opinion mentions, as an abstract "proposition," that different photographers' skills may lead to "some variation in photographs of a single event," Pet. App. 5a, but never mentions that the jury was specifically instructed to evaluate the "ability and experience and knowledge of the photographer," App. 305, and received ample testimony and visual evidence with which to make that evaluation.

evidence, the appellate panel very briefly considered one part of Ms. Kinne's testimony, found themselves unpersuaded by it, Pet. App. 6a, and without further reference to any part of the record "found" that the majority of the lost transparencies were worth no more than $100 each. Pet. App. 9a. Having thus reexamined the jury's fact-findings, the Court of Appeals assessed the damages to be less than one quarter of the original jury award. *Id.*

SUMMARY OF ARGUMENT

For the Court of Appeals to apply a state standard of review to the jury's findings of fact on damages in a diversity case, it needed to ignore the plain language of the Seventh Amendment's reexamination clause, the Amendment's history, the well-documented common law practice at the time the Amendment was adopted, and two lines of this Court's precedents: one line, never repudiated by the Court, flatly prohibiting appellate review of the jury's findings of fact on damages; the other, most recently reaffirmed by a unanimous Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79 (1989), holding that federal, not state, standards of review apply in diversity cases.

One need look no further than this Court's recent precedents to see that the issue raised by the Second Circuit's opinion already has been decided by this Court several times, most recently in *Browning-Ferris*: the Seventh Amendment and fundamental federal policy require that federal courts sitting in diversity apply federal law on the division of fact-finding responsibility among the jury, district judge and appellate court. *See, e.g., Browning-Ferris*, 492 U.S. at 278-79; *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538-39 (1958).

A re-reading of *Browning-Ferris* alone is sufficient to establish the Court of Appeals' error in this case. However, to appreciate the magnitude of that error and establish meaningful guidelines for the future, one must look to the Seventh Amendment and the common law tradition embodied therein.

As the vigorous public debates surrounding the passage of the Seventh Amendment reveal, the Amendment's reexamination clause, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," U.S. Const. amend. VII, was specifically intended to preclude the exercise of appellate review over issues of fact decided by a jury, in the absence of trial error. By adverting to the "rules of the common law," the Seventh Amendment was understood to refer to the well-known English common law procedure for appellate review, the writ of error, by which only questions of law -- and not issues of fact -- could be reviewed in the appellate courts.

The American practice at the time of the Seventh Amendment's passage, and in the years following, was consistent with English common law and the purpose of the Seventh Amendment. Indeed, the Judiciary Act of 1789, enacted one day before the Seventh Amendment was sent to the States for ratification, set the practice in the federal courts by restricting appellate review to the common law writ of error. Challenges to a jury's verdict based on the weight of the evidence, and claims that damages were excessive, were restricted to the trial court. And as this Court held in our early history, and repeatedly reaffirmed thereafter, the denial of a motion for a new trial, in the absence of trial error, was unreviewable on appeal.

Federal appellate court reexamination of the jury's findings of fact on damages, absent trial error, is unconstitutional; it is also unnecessary for meaningful judicial review of juries' damage awards. The District Court retains authority to review the award for excessiveness or inadequacy, and to award remittitur where appropriate; the Court of Appeals may review for any legal error, including sufficiency of the evidence to support a trial judge's denial of a motion for judgment as a matter of law.

Assuming *arguendo* that some form of appellate review of jury fact-finding on damages may be constitutional, it may only occur under an extremely deferential abuse of discretion standard. This is the standard to which this Court alluded in its recent cases raising

(but declining to decide) the issue of whether appellate review of jury awards is ever constitutional. For "abuse of discretion" to be more than an empty incantation, it must mean that a District Court's denial of a new trial motion based on the amount of damages will be overturned by the Court of Appeals only when there is *no evidence* in the record to support the amount awarded. A federal appellate court may not re-weigh conflicting evidence and substitute its own assessment of damages for that of the jury.

To reach its decision, the Court of Appeals not only ignored the Constitution and this Court's precedents; it also ignored the evidence, on which the jury relied, demonstrating the value of Mr. Gasperini's photographs. Because the presence of that evidence at trial is undeniable, and because a federal appellate court may not substitute its re-weighing of conflicting evidence for the assessment of the jury, the decision of the Court of Appeals must be reversed and the judgment of the District Court and verdict of the jury reinstated.

ARGUMENT

I. IN A DIVERSITY CASE, FEDERAL COURTS ARE CONSTRAINED BY THE SEVENTH AMENDMENT AND MUST APPLY A FEDERAL, NOT STATE, STANDARD WHEN ASKED TO REVIEW A MOTION FOR A NEW TRIAL.

When a district court sitting in diversity leaves undisturbed the jury's findings of fact, a federal appellate court, if it may review the decision at all, must do so under a federal standard of review. This result is logically inescapable because the limits of such review are set by the Seventh Amendment's mandate that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Regardless of how the Amendment's strictures are interpreted, their application to a federal court's reexamination of a jury's fact-finding on damages is beyond question. *See Dimick v. Schiedt*, 293 U.S. 474 (1935) (federal district court award of additur violates Seventh Amendment). The Rules of Decision Act

cannot -- and does not purport to -- direct the use of a state standard where a federal constitutional standard controls. *See* U.S. Const., Art. VI, cl. 2 (Supremacy Clause); 28 U.S.C. § 1652.[7] It has long been the law that federal courts cannot review *de novo* facts determined by a jury. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 243-46 (1897); *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277-79, 281-82 (1870). In contrast, some state courts, such as New York, are empowered to do just that. N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995).[8] State law cannot be used to justify a federal appellate court's *de novo* review of a jury's findings of fact any more than it could cause federal judges to be voted out of office.[9]

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[7] "The laws of the several states, except where the Constitution or treaties of the United States or Acts or Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

[8] "The appellate division shall review questions of law *and questions of fact* on an appeal . . . ." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995) (emphasis supplied). This provision "encapsulates the long-settled law" on the Appellate Division's broad powers of review. 7 Jack B. Weinstein et al., *New York Civil Practice* ¶ 5501.19, at 55-50 (1995). *See, e.g., id.*, ¶ 5522.03, at 55-210 ("The Appellate Division has the power to set aside a jury verdict when the verdict is against the weight of the evidence."); *Cohen v. Hallmark Cards, Inc.*, 382 N.E.2d 1145, 45 N.Y.2d 493, 498 (1978) ("In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether the particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury . . . and the Appellate Division concludes that the jury has made erroneous factual findings, the court is *required* to order a new trial") (emphasis supplied). In contrast, the section delineating the scope of review of the State's highest court provides: "The court of appeals shall review questions of law only, except that it shall also review questions of fact *where the appellate division . . . has expressly or impliedly found new facts* . . . ." N.Y. Civ. Prac. L. & R. § 5501(b) (McKinney 1995) (emphasis supplied). State courts are not bound by the Seventh Amendment. *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931).

[9] In considering the Second Circuit's adoption of a New York State rule according substantially less deference to the jury, it is worth observing that the New York State Constitution, unlike the federal Constitution, provides another process by (continued...)

Citing both to the Seventh Amendment and fundamental federal policy, this Court has repeatedly held that federal courts sitting in diversity must apply federal law on the division of fact-finding responsibility among the jury, district judge and appellate court. A unanimous Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), held:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. . . . *Federal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.*

492 U.S. at 278-79 (citations and footnotes omitted) (emphasis supplied); *see id.* at 280 n.26 ("federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant . . . to take steps which ultimately might interfere with the proper role of the jury."). *Browning-Ferris* merely reconfirmed the earlier statement in *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977), that in diversity cases "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." As this Court stressed in

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[9] (...continued)
which the state judiciary remains in touch with "the layman's common sense" and the "wishes and feelings of the community," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting): the judges of the trial-level Supreme Court and the Appellate Division are elected. *See* N.Y. Const. art. 6, § 6(c) (the "justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve"); *id.*, § 4(c) (the appellate division shall consist of supreme court justices so designated by the governor). *See infra* note 14 (on federalism). The New York State standard of review which the Second Circuit has grafted on to the federal appellate process is but one element of a state judicial system that has divided fact-finding responsibilities in a manner fundamentally different from the federal system. *See supra* note 8 (on Appellate Division power to find facts); *infra* note 15 (power to award additur).

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 538-39 (1958):

> It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts. . . . "[S]tate laws cannot alter the essential character or function of a federal court" . . ., and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court . . . . Perhaps even more clearly in light of the influence of the Seventh Amendment, the function assigned to the jury "is an essential factor in the process for which the Federal Constitution provides."

Id. (quoting *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931) (citations omitted)). *See also Simler v. Conner*, 372 U.S. 221, 222 (1963) (per curiam) ("[w]e agree . . . that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.") (citations and footnotes omitted); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962).

That the Seventh Amendment requires a federal standard to be used when reviewing a district court's denial of a new trial for excessive damages has been recognized by commentators[10] and

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[10] "The grant or denial of a new trial is a matter of procedure governed by these [federal] rules and not by state law or practice. There has been an occasional dictum to the contrary, and some slight tendency to look to state law on such questions as ordering a remittitur or reviewing the excessiveness of a verdict, but this seems quite unsound. The incidents of jury trial are for the federal courts to decide for themselves, guided by the Seventh Amendment, and are not a matter on which state law should be given any effect." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2802, at 42-45 (2d (continued...)

most of the Courts of Appeals that have analyzed the issue.[11] While some other Courts of Appeals, with little or no explanation, have employed a state standard of review, none has used state standards to shift fact-finding power as radically as has the Second Circuit.[12]

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[10] (...continued)
ed. 1995) (footnotes omitted); *see also* Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 329 ("It is . . . difficult to understand how federal judges can assess the extent of their authority under the seventh amendment by looking to the practices of state judges, who, so far as the federal constitution is concerned, are free to re-examine any fact found by a state jury."); Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. Rev. 271, 326-27 (1994).

[11] *See Mayer v. Gary Partners & Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994) (Easterbrook, J.) (adopting federal standard after considering Seventh Amendment, this Court's precedents, Seventh Circuit caselaw and positions of other circuits); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991) (federal standard of review required because "right to jury trial secured by the Seventh Amendment . . . reserves the weighing of evidence and the finding of facts exclusively to the jury"); *LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 447 (1st Cir. 1976) (federal standard of review required because "the seventh amendment not only assures . . . a jury trial but also that the jury's factual determinations will be reexamined only 'according to the rules of the common law'"); *see also Vizzini v. Ford Motor Co.*, 569 F.2d 754, 760 (3d Cir. 1977) (the standard of review of a district court's decision on a motion for new trial "is a matter of federal procedure and is, in no wise, subject to state practice"). In a partial dissent in *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1160-67 (5th Cir. 1985), Judge Tate also offered a detailed analysis of why a federal appellate court may not apply a state standard of appellate review as to the trier of fact's determination of damages.

[12] While only the Second Circuit has explicitly rejected the use of a federal standard of appellate review of jury verdicts in diversity cases, several circuits have, without explanation, stated that a federal standard of review is applicable and then applied a state standard of review in reexamining the jury's findings on damages. *See Piotrowski v. Southworth Products Corp.*, 15 F.3d 748, 754 (8th Cir. 1994) ("As an appellate court, we . . . may not reverse except for a manifest abuse of discretion. . . . In considering the excessiveness of a verdict, we are guided by the law of the forum state."); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 (continued...)

In the present case, the Court of Appeals justified its extensive reweighing (and recharacterization) of the evidence on a "cold paper record," Pet. App. 9a, by reference to a New York State Civil Practice provision providing that where a jury returns an itemized verdict, the State's Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. ("CPLR") § 5501(c) (McKinney 1995). Under New York law, CPLR § 5501(c) empowers the Appellate Division to make a complete reexamination of the jury's fact- finding in determining whether to order a new trial or award conditional remittitur or additur. The Court of Appeals readily recognized that this standard altered the division of fact-finding responsibility by "accord[ing] less deference to the jury's award than does the traditional standard, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court," Pet. App. 8a, but considered itself bound to use the New York State standard of review under the Second Circuit's recent decision in *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003 (2d Cir. 1995) (amended).[13] In *Consorti*, the Court of Appeals also recognized

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12 (...continued)
F.2d 1441, 1446 (11th Cir. 1991) ("We look to Georgia law to determine whether the verdict is excessive, but federal law applies to our review of the decision to order a new trial as the result of an excessive verdict."); *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1155-56 (5th Cir. 1985) (asserting that it is unnecessary to resolve the issue because state and federal standards are similarly "subjective," then determining that damages were excessive in comparison to state court awards). The lack of analysis by those courts of appeal that have applied a state standard of review to a jury's findings on damages has been noted by other judges. *See Mayer v. Gary Partners & Co., Ltd.*, 29 F.3d at 332 (Seventh Circuit cases applying state standard of review do not cite earlier cases specifying a federal standard, nor provide reasons for the change); *In re Air Crash Disaster Near New Orleans*, 767 F.2d at 1166 (Tate, J., dissenting in part) ("no circuit decision that I can find explains on any articulated basis" how a state standard of appellate review would apply to a district court's denial of a motion for remittitur).

13 In the Court of Appeals opinion below, and in the *Consorti* opinion, the Second Circuit failed to observe any basis for the fact-finding role of the jury in either the text of the Constitution or this Court's precedents. Instead it referred to a (continued...)

that "the New York rule . . . is less deferential to the jury's verdict than the federal standard," yet found the New York State Appellate Division standard of review of the jury's findings of fact on damages applicable in diversity because it considered the rule "substantive." *Id.* at 1011 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

The Second Circuit's reasoning in *Consorti* is deeply and dangerously flawed. No *Erie* analysis can justify the substitution of a state rule for a standard mandated by the Seventh Amendment. *See* U.S. Const. art. VI, cl. 2; 28 U.S.C. § 1652; *Browning-Ferris*, 492 U.S. at 278-80 & n.26; *Byrd*, 356 U.S. at 538-39.[14] A

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13 (...continued)
deferential standard of review of jury fact-finding as no more than a tradition of the Second Circuit. *See* Pet. App. 8a; *Consorti*, 72 F.3d at 1011-12.

The amended *Consorti* opinion discussed here was issued after the Second Circuit's decision in *Gasperini*. The original opinion, *Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781, 789-90 (2d Cir. 1995), on which the *Gasperini* court relied, offered no reasons for use of a state standard of review.

14 Although a policy analysis under *Erie* and *Hanna v. Plummer*, 380 U.S. 460, 467 (1965), cannot be used to displace the constitutionally-mandated fact-finding role of the jury in federal courts, we note that adherence to the constitutional standard in diversity cases does not offend the policies of *Erie*. According juries the deference traditional at common law does not lead to inequitable administration of the laws. Moreover, any claim that the Second Circuit's action discourages forum-shopping by reducing variation between the two fora is particularly nonsensical, because the Second Circuit's lopsided adoption of the CPLR § 5501(c) remittitur standard without its accompanying additur standard, *see infra* note 15, does not conform the federal court's standard of review to that of the state. As the additur example illustrates, the differences in the structure and procedures of the state and federal systems are numerous and fundamental; taking one state procedure out of its context and inserting it into the federal process may create a larger, rather than smaller, difference between the state and federal tribunals. *See also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2802, at 45 (2d ed. 1995) (footnote omitted) ("even if this is thought to be an unfettered Erie choice, within the doctrine of Hanna v. Plummer, it seems beyond belief that parties would resort to forum shopping in order to have a more favorable rule on granting new trials"); Steven Alan Childress, *Judicial* (continued...)

contrary view leads to absurdities. For example, CPLR § 5501(c), which the Second Circuit purported to adopt under *Erie*, empowers the New York Appellate Division to require additur where it finds the jury award "inadequate"; if, as the Second Circuit reasoned, CPLR § 5501(c) must control the Court of Appeals' review of the jury's findings on damages, then the Second Circuit is required to employ the additur as well as remittitur powers conferred by the provision. Yet it is well-established -- even in the Second Circuit -- that the use of additur in federal courts violates the Seventh Amendment.[15]

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[14] (...continued)
Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?, 47 SMU L. Rev. 271, 315-325 (1994) (*Erie* analysis counsels for a uniform federal standard of review).

Principles of federalism are in no way compromised by the Seventh Amendment's requirement of deference to jury fact-finding in federal courts. When a state legislature endows its own appellate judges – who may be elected to office by the citizens of the state, or appointed by the governor and approved by the legislature of that state, and are controlled by the constitution, substantive law and procedural law of that state -- with greater power to disturb jury fact-finding, there is no reason to believe that the legislature would also favor the same power be accorded life-tenured federal appellate judges who may have little connection to the state and certainly are not answerable to its citizens. At the time the Constitution was framed, trial by jury was considered an essential check on a potentially elitist federal judiciary. *See* 3 *The Complete Anti-Federalist* 61 (Herbert Storing ed., 1981) (A Democratic Federalist) ("what satisfaction can we expect from a lordly court of justice. . . . O! my fellow citizens, think of it while it is yet time, and never consent to part with the glorious privilege of trial by jury, but with your lives.").

[15] *See Dimick v. Schiedt*, 293 U.S. 474 (1935); *Gibeau v. Nellis*, 18 F.3d 107, 111 (2d Cir. 1994) ("we are mindful that a federal court's increase of a jury award would constitute impermissible additur where it would violate the Seventh Amendment right to a jury trial."); *cf. Sharrow v. Dick Corp.*, 612 N.Y.S.2d 537, 538-39 (App. Div. 1994) ("We conclude that the damages awarded for past and future pain and suffering deviate materially from what would be reasonable compensation (*see*, CPLR 5501[c]). A new trial on damages . . . is granted unless defendants . . . stipulate to *increase* the verdict to $100,000 for past pain and suffering and $50,000 for future pain and suffering") (emphasis supplied), *rev'd on other grounds*, 86 N.Y.2d 54, 629 N.Y.S.2d 980 (1995).

The *Consorti* opinion was in error not only in its assumption that *Erie* controls the choice of standard of review over jury findings of fact, but also in its assertion that the state standard of review was "substantive." The standard of review used by a court examining a finding of law or of fact, made by a judge or a jury, is a procedural matter distinct from the substantive law underlying the claim at issue. As Judge Easterbrook observed:

> Take a jurisdiction in which even a scintilla of evidence favoring the plaintiff requires submission of the case to a jury. The judge does not instruct this jury that a scintilla of evidence is enough for the plaintiff to prevail . . . . The "scintilla of evidence" standard determines *who* resolves the factual dispute, and a "preponderance [of the evidence]" standard tells that body *how* to evaluate the evidence presented . . . . [N]othing in *Erie* or the Rules of Civil Procedure commands a federal court to accept the state's views about who should evaluate the evidence.

Mayer v. Gary Partners & Co., Ltd., 29 F.3d at 335 (emphasis in original).[16] Like the "scintilla of evidence" standard, or a "clearly erroneous" standard, New York's "deviates materially" standard is not used to instruct the original finders of fact, but rather is used to determine the point at which the fact-finding power shifts from the jury to the Appellate Division. *See also Concrete Pipe & Products v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2279 (1993) (standards of review describe "not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof.").

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[16] While the Seventh Circuit's explanation of the substance/procedure distinction is helpful, the federal standard of review it adopts in *Mayer* does not appear to differentiate between the district court judge who witnessed the trial and the court of appeals judges who did not. The Seventh Amendment mandates such a distinction. *See infra* Points II and III.

In attempting to characterize the New York State standard of review as substantive, the *Consorti* court likened it to state laws that disallow compensation for nonpecuniary loss, or that schedule the damages awarded in the manner of workers' compensation statutes, arguing that the New York rule also sets a limit on the damages a jury may award. *See* 72 F.3d at 1011. The two hypothetical provisions offered by the Court of Appeals, however, set absolute limits on damages as a matter of law and have nothing to do with the fact-finding process. In contrast, a standard that limits jury verdicts to what an appellate court considers "reasonable" after re-weighing the evidence is not a substantive limit on the right to obtain damages but a procedural determination of who will assess damages.[17]

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[17] Equally unjustifiable under an *Erie* analysis is the practice by some Circuits of using the damages awarded in unrelated but allegedly similar state cases to set an upper boundary on the damages available in the case at issue. *See, e.g., In re Air Crash Disaster Near New Orleans*, 767 F.2d at 1156 (reducing jury award of $400,000 for loss of child in part because "[t]he highest reported Louisiana state court award for the loss of the love and affection of a child appears to be $150,000.").

> It seems evident that no question of *Erie*-controlling state substantive law is implicated by state appellate decisions, as to whether under state standards of appellate review a state trial-award was or was not excessive under the particular facts before the state courts. The state appellate decisions in the particular instances no more represent state substantive law than does one trial-jury's quantum award bind as a matter of state law another state trial court in its award of damages for similar injuries in another case.

Id. at 1165 (Tate, J., dissenting in part). To assume that the size of verdicts in allegedly similar earlier state cases are correct and *binding* in the cases at issue is indeed "an unusual use of offensive collateral estoppel." Schnapper, *supra*, 1989 Wis. L. Rev. at 331. This case provides a stark example of the danger in this approach. The court below looked to *MacWeeney, Inc. v. Esquire Assocs.*, 574 N.Y.S.2d 340, 341 (App. Div. 1991), to determine the value of photographs where there is no evidence of uniqueness. Pet. App. 4a-5a. But, the court in *MacWeeney* reduced the findings on damages after a bench trial because "at least 114 of the [189] slides were of the same pose, and the balance were of only two other poses." 574 N.Y.S.2d at 341.

Having incorrectly declared the Appellate Division's standard of review of a jury's fact-finding on damages to be "substantive," the *Consorti* court then argued that this Court in *Browning-Ferris* declined to craft a set of federal common law standards for the award of punitive damages.[18] *See* 72 F.3d at 1012 (citing *Browning-Ferris*, 492 U.S. at 279-80). This argument makes no sense. The *Browning-Ferris* petitioners and their *amici* had urged the Court to place substantive limits on the factors relevant to a determination of punitive damages. *See* 492 U.S. at 279. However, this Court's discussion of the substantive proposals had nothing to do with the appropriate standard of appellate review, which the Court had already stated must be governed by federal law. *Id.* at 278-79. The Court's refusal to adopt the *Browning-Ferris* petitioners' recommendations as a matter of "federal common law" is not apposite.

Unraveling the reasoning that led the Court of Appeals to re-weigh the evidence of Mr. Gasperini's loss -- without having heard a single witness and without ever having seen any reproduction of his work -- is a difficult task. Fortunately, the reasoning that should have been employed by the Court of Appeals is far more straightforward: The "strictures of the Seventh Amendment," *id.* at 280 n.26, control the standard of review when a federal court of appeals reexamines a jury's findings of fact on damages. The constitutionally mandated fact-finding role of the jury in federal courts cannot be eviscerated by the adoption of a state standard of review in diversity cases.

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[18] *See, e.g.*, Brief for Petitioners at 43, *Browning-Ferris* ("there is no basis in economic logic for giving any substantial weight to the size of a corporate defendant"); Brief Amici Curiae of Arthur Anderson & Co. in Support of Petitioners, *Browning-Ferris* (arguing against imposition of punitive damages based on vicarious organizational liability).

II. THE SEVENTH AMENDMENT PROHIBITS APPELLATE REVIEW OF A JURY'S FACT FINDINGS, ABSENT TRIAL ERROR.

The reexamination clause of the Seventh Amendment, which states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," U.S. Const. amend. VII, prohibits appellate review of a jury's fact-findings absent trial error. This language is *sui generis*; only the Seventh Amendment commands us to look to the rules of common law for its meaning. The history of the Amendment demonstrates that the reexamination clause was a response to critics who feared that the Supreme Court's appellate jurisdiction over "Law and Fact," U.S. Const. art. III, § 2, cl. 2, would allow appellate review of jury fact-finding, and thus abolish jury trials. Under the English common law preserved by the Seventh Amendment, as well as under American jurisprudence at the time the Amendment was ratified, such appellate review of jury fact-finding was impossible. Only the judge who tried the case possessed any ability to disturb the jury's findings. The prohibition of appellate review of a jury's fact-finding has been reaffirmed by this Court in a multitude of never-repudiated cases spanning 150 years, and should be reaffirmed again in this case.

A. The Seventh Amendment's "Reexamination Clause" Was Designed to Prevent The Exercise Of Appellate Review Over Issues Of Fact Decided By A Jury, By Restricting Appellate Courts To The Common Law "Writ Of Error."

By the time of the Constitutional Convention of 1787, trial by jury was already established as "the form of trial in civil cases to which people and their politicians were strongly attached." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 656 (1973).[19] Yet, when the

[19] "The right to trial by jury was probably the only one universally secured by the (continued...)

Convention was held, the framers made no provision for a bill of rights generally or for the right to trial by jury in civil cases specifically. When it came before the state ratifying conventions, "[o]ne of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).[20]

One of the principal arguments made by the "antifederalists" who fought for the constitutional guarantee that became the Seventh Amendment was that the right to jury trial would be abolished by the Constitution's provision that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . . ." U.S. Const. art. III, § 2, cl. 2. The Seventh Amendment's reexamination clause was designed to address this concern, by preventing appellate review of jury fact-findings in the federal courts. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913).

Only a month after the Constitution was transmitted to the Continental Congress, Richard Henry Lee of Virginia attacked the provision for appellate review of facts, arguing that as a result "the jury trial is not secured . . . ." 2 *The Complete Anti-Federalist* 244

19 (...continued)
first American state constitutions . . . ." L. Levy, *Freedom of Speech and Press in Early American History -- Legacy of Suppression* 281 (1963). The first Continental Congress unanimously resolved that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress 28 (1774). The Articles of Confederation, art. IX, likewise guaranteed the right to trial by jury.

[20] Indeed, "the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Wolfram, *supra*, 57 Minn. L. Rev. at 657. *See* James Madison, *Debates in the Federal Convention*, in 2 *Records of the Federal Convention of 1787*, at 587-88, 628, 633 (Max Farrand ed., 1911).

(Herbert J. Storing, ed., 1981).[21] At the Virginia ratifying convention, Patrick Henry argued against the federalists' effort "to persuade us to part with that trial by jury," thus: "I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. *No appeal can now be made as to fact in common-law suits*." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 544 (Jonathan Elliot ed., 1891) (hereinafter "*Elliot, Debates*") (emphasis supplied); *see also id.* at 546.[22]

In Pennsylvania, a "Democratic Federalist" publicly attacked appellate authority to review facts as abolishing the right to jury trial:

> The word *appeal*, if I understand it right, in its proper legal significance includes the *facts* as well as the *law*, and precludes every idea of a trial by jury. . . .
>
> An *appeal*, therefore, is a thing unknown to the common law. Instead of an appeal from facts, it admits of a second, or even third trial by different juries, and mistakes in points of *law* are rectified by superior courts in the form of a *writ of error* . . . .

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[21] "By the common law, in Great Britain and America, there is no appeal from the verdict of the jury, as to facts, to any judges whatever -- the jurisdiction of the jury is complete and final in this; and only errors in law are carried up to the house of lords, the special supreme court in Great Britain; or to the special supreme courts in Connecticut, New-York, New-Jersey, &c. Thus the juries are left masters as to facts: but, by the proposed constitution, directly the opposite principle is established. An appeal will lay in all appellate causes from the verdict of the jury, even as to mere facts, to the judges of the supreme court." *Id.* at 322.

[22] *See also* 3 *Elliot, Debates* 568 (statement of William Grayson) ("trial by jury is given up . . . as they have an absolute appellate jurisdiction of facts, they may alter them as they may think proper"); *id.* at 527-28 (statement of George Mason) (with the grant of "appellate jurisdiction . . . both as to law and fact . . . [i]s not a jury excluded absolutely?").

Pennsylvania and the Federal Constitution, 1787-1788, 152-53 (John B. McMaster & Frederick D. Stone eds., 1888) (emphasis in original). As indicated, the antifederalists repeatedly adverted to their understanding of the common law, which prohibited appellate review of a jury's fact-findings under the writ of error.[23] When the Pennsylvania antifederalists met several months after the ratifying convention to propose amendments to the Constitution, among them was a proviso to be added to article III, § 2, that "appellate jurisdiction, in all cases of common-law cognizance, be by a writ of error, and confined to matters of law only." 2 *Elliot, Debates* 546. *See also* 3 *The Complete Anti-Federalist*, *supra*, at 159 ("appeal from both *law* and *fact* . . . is utterly inconsistent with the principles of the common law, and trials by jury") (emphasis in original).[24]

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[23] *See* Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 W. & Mary Q. 301, 311 (1965) ("Jury Trials may be superceded in Civil Cases[.] Appellate Jurisdiction is a Civil Law Term[.] There can be no Appeal after Jury Trials. I fear there is an Intention to substitute the Civil Law in the Room of the Common Law[.]") (statement of John Smilie); *see also id.* at 311, 312 ("Writ of Attaint lies against a Jury for giving a false Verdict . . . . England corrupt as she is would not fix an Innovation like our Appellate Jurisdiction") (same).

[24] Similar arguments for preventing appellate review of a jury's fact-findings were made in the other state ratifying conventions. In New York, the antifederalists moved to amend article III, § 2, to provide that "all appeals" in common law actions "are to be by writ of error, and not otherwise." 2 *Elliot, Debates* 408-09. This proposed amendment was made part of the convention's ratifying document. 1 *Elliot, Debates* 328, 329; *see also* 2 *The Complete Anti-Federalist*, *supra*, at 431, 433. Likewise, in Maryland the antifederalists proposed an amendment that from jury trials "there shall be no appeal . . . except on matter of law," to "prevent the appeal from fact, which . . . destroys that trial in civil cases . . . ." 2 *Elliot, Debates* 550-51. *See also* 2 *The Complete Anti-Federalist*, *supra*, at 70 (statement of Luther Martin) (right to jury trial is "*take[n] away*" by "appellate jurisdiction both as to law and *fact*") (emphasis in original).

The federalists, not surprisingly, viewed federal appellate power to review a jury's fact-findings more positively. In Pennsylvania, James Wilson defended the exercise of appellate review as to both law and fact to restrain juries from making egregious determinations. 2 *Elliot, Debates* 493-94; *see also id.* at 518-19.

(continued...)

Shortly after the Constitution was adopted and the new government began operations, Madison introduced suggested amendments in Congress, to show his constituents that their representatives were taking a proper attitude "to a subject they have much at heart." 1 Annals of Cong. 444 (Joseph Gales ed., 1789).[25] With little recorded debate, Congress ultimately combined these provisions to form the Seventh Amendment. Two years later, when the requisite States ratified the Seventh Amendment, the antifederalist argument for limiting appellate review of jury verdicts to the common law writ of error became part of our constitutional design.

B. When The Seventh Amendment Was Adopted, The English Common Law Writ of Error Only Permitted Appellate Review Of Questions Of Law, And Absent Trial Error, Appellate Review Of A Jury's Fact Findings Was Precluded.

The ratifiers who pressed for the Seventh Amendment correctly understood their common law heritage.[26] While the structure of

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[24] (...continued)
Likewise, Wilson's colleague, Thomas McKean, defended appellate review of facts. *Id.* at 539-40; *see also* Pittman, *supra*, 22 Wm. & Mary Q. at 314 (statement of Thomas McKean). But in considering the debates of the federalists and antifederalists over the scope of appellate review, one must bear in mind that "on the matter of civil jury trial the antifederalists won." Wolfram, *supra*, 57 Minn. L. Rev. at 672.

[25] As originally written, the Seventh Amendment's reexamination clause amended the Constitution's provision for "appellate Jurisdiction, both as to Law and Fact . . . ." U.S. Const. art. III, § 2, cl. 2. *See* 1 Annals of Cong. 452, 784 (Joseph Gales ed., 1789).

[26] In construing the Seventh Amendment's reexamination clause this Court has repeatedly held that the provision's reference to common law "had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states." *Capital Traction Co. v. Hof*, 174 U.S. 1, 8 (1899); *see also Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *cf. United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16, 750). *See* (continued...)

the English common law courts could be confusing,[27] the method of reviewing the judgment of a trial court was straightforward. At the time of the passage of the Seventh Amendment, all appellate review of the common law trial courts was by "writ of error." Under this procedure, only questions of law, not a jury's findings of fact, could be reviewed. As Blackstone stated:

> A writ of error lies for some supposed mistake in the proceedings of a court of record . . . . The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of *facts*, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

3 William Blackstone, *Commentaries on the Laws of England* 405-06 (1st ed. 1768) (hereinafter "Blackstone, *Commentaries*") (emphasis in original); *see also* Thomas Wood, *An Institute of the Laws of England* 611 (3d ed. 1724) (no writ of error "if the Errors are only Matters of Fact, because it may be brought in the same Court to Reverse it"). Specifically, "one could not bring a writ of

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[26] (...continued)
also Wooddell v. Int'l Brotherhood of Electrical Workers, 112 S. Ct. 494, 497 (1991).

[27] The three common law trial courts – the King's Bench, the Court of Common Pleas, and the Court of Exchequer – had coordinate jurisdiction in many types of cases, and the system of review among them was complicated as well. Theodore F. T. Plucknett, *A Concise History of the Common Law* 210 (5th ed. 1956). Moreover, under this system a court might act in both a trial and appellate capacity. G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* 212-13 (3d ed. 1954); *see also* 3 William Blackstone, *Commentaries on the Laws of England* 410-11 (1st ed. 1768); Thomas Wood, *An Institute of the Laws of England* 610-11 (3d ed. 1724). (This confusing system of appellate jurisdiction was simplified somewhat in 1830. *See* Radcliffe & Cross, *supra*, at 213-14; Plucknett, *supra*, at 210.) Although unusual in today's practice, such a system whereby a judge or court would act in both a trial and an appellate capacity (in different cases) was not foreign to early American jurisprudence.

error . . . that the verdict was against the evidence . . . . For the same reason one could not appeal against a refusal of the court *in banc* to grant a new trial . . . ." Radcliffe & Cross, *supra*, at 211-12.

This does not mean that a jury's verdict could not be challenged at common law. Rather, the writ of error procedure meant that, in the absence of any trial error, any challenge to the jury's verdict had to occur in the trial court. Thus, a party could move to set aside the verdict and have a new trial on a variety of grounds, including that there was jury misconduct, or that the trial court misdirected (or improperly instructed) the jury, or that the verdict was against the weight of the evidence, or that the damages awarded were excessive. Wood, *supra*, at 602; 3 Blackstone, *Commentaries* 375-76, 387-88; Radcliffe & Cross, *supra*, at 187. But any such motion for a new trial had to be made to the trial court and, as already noted, the trial court's denial of a new trial was not reviewable on a writ of error. Radcliffe & Cross, *supra*, at 211-12.

There is not a single English common law decision from the period of the Seventh Amendment's adoption that asserts the power of an appellate tribunal to review a jury's fact-findings, or to review the denial of a motion for a new trial. So well established are historical limits on the common law writ of error, even proponents of appellate review of jury verdicts concede that the writ of error was available only for some error of law, there was no review of the verdict as against the weight of the evidence on appeal, and a party could not seek appellate review of the denial of a motion for a new trial. *See, e.g.*, Jerry LeMond, *Federal Review of Excessive Verdicts*, 30 Tex. L. Rev. 242, 244 & n.19 (1951) (conceding "the absence of cases in which new trials were granted by the Court of King's Bench when it sat as a court of appeals from Common Pleas").

Modern arguments for appellate review of jury fact-findings, therefore, eschew reference to the actual appellate procedures available at English common law when the Seventh Amendment was enacted. Instead, twentieth century proponents of appellate

review rely on *trial* procedures developed in the seventeenth century, to argue that English common law trial courts them-selves exercised a "quasi-appellate" review of jury fact-findings.

The English common law trial courts sat at Westminster Hall in panels of four justices each. The trial court thus constituted would hear cases *en banc*, meaning that the case was tried by a jury "at the bar" with all four justices present. 3 Blackstone, *Commentaries* 352; Radcliffe & Cross, *supra*, at 90.[28] Over time it became inconvenient to try every case at Westminster, so in the late thirteenth century a system developed that allowed cases to be tried by jury before a single judge who traveled to the county where the jurors, parties and witnesses were located. This system for conducting jury trials before a single judge outside Westminster Hall, analogous to the American practice of "riding the circuits," came to be known as the *nisi prius* system. 3 Blackstone, *Commentaries* 352-53. Gradually, the *nisi prius* system extended to civil proceedings of every sort, although jury trials "at the bar" continued to be held before the court *en banc* in Westminster in some cases. Radcliffe & Cross, *supra*, at 90-91. Generally, though not always, the *nisi prius* judge was a member of one of the three common law trial courts (the King's Bench, the Common Pleas or the Exchequer). *Id.* at 91; *see also* 3 Blackstone, *Commentaries* 354, 356.

While the jury proceedings could be conducted at *nisi prius*, the court sitting *en banc* at Westminster remained the trial court for the action. "Thus the action was commenced at Westminster, the pleadings . . . were conducted before the court at Westminster, and it was only if and when an issue of fact emerged which necessitated

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[28] Although trials held before *en banc* panels are largely unknown today in the United States, they were not uncommon at the time of the Seventh Amendment's adoption. *See, e.g., Thurston v. Martin*, 23 F. Cas. 1189, 1190 (C.C.D. R.I. 1830) (No. 14,018) (jury trial held before federal trial court consisting of Circuit Justice and District Judge); *Walker v. Smith*, 4 U.S. (4 Dall.) 389 (C.C.D. Pa. 1804) (same); *Respublica v. Lacaze*, 2 Dall. 118, 121 (Pa. Sup. Ct. 1791) (jury trial held before *en banc* state trial court); *Den v. Vancleve*, 5 N.J.L. 680 (Sup. Ct. 1819) (same).

a trial by jury that the action was sent for trial at *nisi prius*." Radcliffe & Cross, *supra*, at 91. Moreover, when the verdict was reached at *nisi prius*, the "record was then remitted back to Westminster, where legal arguments of various sorts might take place before the court there before judgment was entered for one side or the other." *Id.*

At this point in the proceedings, a motion for a new trial might be made. Originally, such a motion was based on allegations of some kind of jury misconduct, but in the seventeenth century the practice expanded so a new trial could be granted if the judge misdirected the jury, if the verdict was against the weight of the evidence, or if the damages were excessive. *Id.* at 187. Because the motion for a new trial was heard by the trial court sitting *en banc* in Westminster, whereas only the *nisi prius* judge was actually present at the trial, some twentieth century courts and commentators have contended that the English common law trial courts exercised a kind of "quasi appellate" review of jury fact-findings.

This argument, however, is flawed in two respects. First, whether trial occurred "at the bar" or at *nisi prius*, the English common law court remained a *trial court*, and review of its judgments could be had only on writ of error. It makes no more sense to analogize the English common law trial court to today's federal appellate court, than to contend that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determination.[29]

More fundamentally, after verdict at *nisi prius* a new trial would be granted on the ground that the verdict was against the

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[29] *See Metropolitan R.R. v. Moore*, 121 U.S. 558, 571, 573 (1887) (although appellate review of denial of new trial motion implicates Seventh Amendment for local courts of District of Columbia, "that rule is not applicable, as between the special and general terms of the supreme court . . . . The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The supreme court sitting at special term, and the supreme court sitting in the general term, though the judges may differ, is the same tribunal.").

weight of the evidence *only* if "the judge who had tried the case 'conceived the verdict to be given against the evidence.'" Indeed, "[i]t was later held . . . that a new trial would not be granted unless the *nisi prius* judge certified *in writing* that the verdict was against evidence." Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Leg. Hist. 201, 213 (1988) (emphasis in original) (citations and footnotes omitted).

For example, in *Leighton v. Leighton*, 1 P.Wms. 671, 672, 24 Eng. Rep. 563 (Ex. 1720), an ejectment action was "tried in *Shropshire* . . . before Mr. Baron *Price*," and a verdict rendered for defendant, "but the Judge certifying against it, a new trial was granted to be at the bar of the *Exchequer* . . . ."

And in *Letgoe ex dem. Wheeler v. Pitt*, Barnes, 439, 94 Eng. Rep. 993 (K.B. 1740), the "cause was tried before Lord Chief Justice at the sittings, and a verdict obtained by lessor of plaintiff. Defendant moved to set aside the verdict . . . and also prayed the Chief Justice's certificate, suggesting that the verdict was contrary to evidence . . . Chief Justice certified . . . that the Chief Justice was of opinion the strength of the evidence was with defendant. Court ordered new trial . . . ."[30]

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[30] *See also Anon.*, 1 Keb. 864, 83 Eng. Rep. 1288 (K.B. 1665) ("the Court on certificate of a Judge, that verdict was given contrary to evidence . . . ordered the sheriff should retorn [sic] a good jury in the new trial"); *Berks v. Mason*, Sayer, 264, 265, 96 Eng. Rep. 874, 875 (K.B. 1756) ("Ryder Ch. J. before whom the cause was tried, reported . . . that the evidence, for the party in whose favour the verdict is found, was so very slight, . . . and . . . that he was dissatisfied with the verdict. . . . The matter was at that day ordered to stand over, for the Chief Justice to look into his notes, in order to make a fuller report. After the Chief Justice had made the above report, it was said in support of the rule; that if the Judge declare himself to be dissatisfied with the verdict, it is the constant practice to grant a new trial . . .").

The common law courts relied on the *nisi prius* judge's personal knowledge of the trial proceedings. In *Mellin v. Taylor*, 3 Bing. N.C. 109, 132 Eng. Rep. 351 (C.P. 1836), the court said:

(continued...)

But if the *nisi prius* judge refused to certify that the verdict was against the weight of the evidence, or that the damages were excessive, the English common law courts consistently denied motions for new trials on those grounds. Thus, in *Redshaw v. Brook*, 2 Wils. K.B. 405, 95 Eng. Rep. 887 (C.P. 1769), the jury gave the plaintiff 2001. damages for trespass, and defendant moved for a new trial on the ground that the damages were excessive. Lord Chief Justice Wilmot, before whom the case was tried, reported: "Although I myself may think 2001. too large damages, yet how can we draw the line to fix the measure of damages in this case? I cannot say the jury have done wrong; and perhaps if I had been one of the jury, some of them might have convinced me that 2001. damages are little enough. I am not dissatisfied with the verdict." *Id.*, 95 Eng. Rep. at 888. Justice Clive, speaking for the court, said: "As my Lord Chief Justice is not dissatisfied, how can we say that these damages are too large? A rule to shew cause why there should not be a new trial was refused per totam Curiam . . . ." *Id.*

Similarly, in *Boulsworth v. Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685), the jury awarded 8001. damages in a case of slander, and the defendant moved "that the Court would grant a new trial for the excessiveness of the damage; whereupon the Court (according to the usage in such cases) gave the defendant time to procure the Judge of Assise, before whom the cause was tried, to signify his opinion of the cause." The judge before whom the case was tried found the verdict was not against the weight of the

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30 (...continued)

> Strong observations have been made, that we cannot have the opportunity of giving an opinion on the demeanour of the witnesses at the trial. . . . But in this case the learned Judge who presided at the trial had that opportunity; and he has reported to us that he is not satisfied with the verdict; a course which has in it no novelty whatever, but has been the constant practice from the earliest time at which new trials have been granted, and is acted upon every day.

Mellin v. Taylor, 3 Bing. N.C. at 112, 132 Eng. Rep. at 352.

evidence. "Whereupon judgment was given for the plaintiff . . . ."[31]

Contemporaneous commentators recognized a jury's verdict could be overturned and a new trial granted by the trial court, on

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31 *See also St. Bar v. Williams*, 3 Keb. 351, 84 Eng. Rep. 761 (K.B. 1674) (although *nisi prius* judge "said ore tenus to the Judges of this Court, that [the verdict] was against evidence," court denied motion for new trial, because there was no *written* certificate from the *nisi prius* judge); *Gilbert v. Burtenshaw*, 1 Cowp. 230, 98 Eng. Rep. 1059 (K.B. 1774) (new trial for excessive damages denied, where *nisi prius* judge "reported that he was very well satisfied with the verdict"); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766) (motion for new trial on ground that damages were excessive denied, where *nisi prius* judge "was not dissatisfied with the verdict"); *Anon.*, 1 Wils. K.B. 22, 95 Eng. Rep. 470 (K.B. 1743) (on motion for new trial, "the Judge who tried the cause certified . . . that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides; so a new trial was refused"); *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (C.P. 1763) (motion for new trial on ground that damages were excessive denied, where *nisi prius* judge was "of opinion the damages are not excessive"); *Ducker v. Wood*, 1 T.R. 277, 99 Eng. Rep. 1092 (K.B. 1786) (on motion to set aside verdict for excessive damages, "upon hearing the report of the Judge, the Court thought fit to reject the motion"); *Anon.*, 1 Keb. 4, 83 Eng. Rep. 775 (K.B. 1661) ("[t]he Court will not award new tryals on the jurors gainsaying their verdicts, unless the Judge before whom it was, conceived the verdict to be given against the evidence per Curiam").

When the common law courts began granting new trials after trial "at the bar" before the entire court sitting *en banc*, they recognized the essential function served by the judge's certificate in deciding whether to grant a new trial at *nisi prius*:

> Of late years, new trials have been granted not only after trials at Nisi Prius, but also after trials at Bar. And it is at least equally reasonable to do it after trials at Bar, as after trials at Nisi Prius, (if the justice of the case demands it;) or, indeed, rather more so, as the latter *must be done upon what could have actually and personally appeared to a single Judge only*, whereas the former is grounded upon what must have manifestly and fully appeared to the whole Court.

Bright v. Eynon, 1 Burr. 390, 395, 97 Eng. Rep. 365, 367 (K.B. 1757) (emphasis supplied).

the ground that the verdict was against the evidence or the damages were excessive, only if the *nisi prius* judge so certified. Thus, Blackstone succinctly set out the grounds for new trial as including legal error, jury misconduct, misdirection by the judge, or "the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages . . . ." 3 Blackstone, *Commentaries* 387 (footnotes omitted). *See also id.* at 388; *id.* at 391 (if the ground for a new trial "arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence");[32] VI *Bacon's Abridgment* 663-64 (6th ed. 1807) (citing a series of English common law courts for the proposition that "[a] new trial has in some cases been granted, because the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence"); Wood, *supra*, at 602 ("A Verdict may be set aside *by the Judge, If it appears to Him* to be Given against Evidence, or against His Direction, or where they Give Excessive Damages &c. and *He may Order a New Trial*") (emphasis supplied).[33]

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[32] It bears emphasis that the "record" did *not* include the evidence presented at trial, Radcliffe & Cross, *supra*, at 211, so without the *nisi prius* judge's report, there was no way for the trial court to evaluate whether the verdict was supported by the evidence. *See also* 3 Blackstone, *Commentaries* 374 (arguing that only live testimony at trial presents "an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge").

[33] While the *nisi prius* judge's certification was required, it was not sufficient to grant a new trial. Indeed, the English common law trial courts regularly denied new trial motions, notwithstanding the *nisi prius* judge's certification that damages were excessive or the verdict contrary to evidence. *See, e.g., Sharpe v. Brice*, 2 Black. W. 942, 96 Eng. Rep. 557 (C.P. 1774); *Rex v. Bennett*, 1 Str. 101, 105, 93 Eng. Rep. 412, 414 (K.B. 1795); *Gough v. Farr*, 1 Y. & J. 477, 480, 148 Eng. Rep. 759, 760 (Ex. 1827); *Swain v. Hall*, 3 Wils. K.B. 45, 46-47, 95 Eng. Rep. 924, 925 (C.P. 1770); *Macrow v. Hull*, 1 Burr. 11, 97 Eng. Rep. 161 (K.B. 1764); *Farewell v. Chaffey*, 1 Burr. 54, 97 Eng. Rep. 187 (K.B. 1756); *Ashley v. Ashley*, 2 Str. 1142, 93 Eng. Rep. 1088 (K.B. 1740); *Smith v. Huggins*, 2 Str. (continued...)

In sum, as the ratifiers well knew, at English common law a jury's determination of facts was not subject to appellate review. In the absence of trial error, any challenge to a jury verdict as being against the weight of the evidence, or for granting excessive damages, could only be made in the trial court. Moreover, the denial of a new trial motion was not subject to appellate review. This well-established common law practice was enshrined as a constitutional principle by the Seventh Amendment's reexamination clause.

C. Contemporaneous American Jurisprudence And This Court's Precedents Spanning 150 Years Precluded Appellate Review Of A Jury's Fact Findings.

The day before Congress sent the bill of rights to the States for ratification, it passed the Judiciary Act of 1789, "always . . . considered . . . a contemporaneous exposition of the highest authority." *Capital Traction Co. v. Hof*, 174 U.S. 1, 10 (1899). The Act made several provisions for trial by jury, *see Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830), and specifically provided that appellate review could be had only on writ of error for which "there shall be no reversal ... for any error in fact." Judiciary Act of 1789, § 22, 1 Stat. 84-85.

Because the statutory writ of error contained in the Judiciary Act of 1789, like the English common law writ of error, limited appellate review to issues of law, early decisions of this Court held that federal appellate review could not consider the excessiveness of damages. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830) described the Seventh Amendment's reexamination clause as

> a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner [than provided at common law]. The only modes known

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[33] (...continued)
1142, 93 Eng. Rep. 1089 (K.B. 1740); *Martyn v. Jackson*, 2 Keb. 398, 84 Eng. Rep. 787 (K.B. 1674); *Anon.*, 6 Mod. 22, 87 Eng. Rep. 786 (K.B. 1794).

> to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings.

Thus, appellate review of a jury verdict as being against the evidence, or for excessiveness of damages, was forbidden. *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166-67 (1859) (whether jury's verdict was warranted "is not a question for an appellate tribunal. . . . Repeated decisions of this court have affirmed the doctrine" that after facts "have been found by a jury" an award of a new trial can only be made "by the court where the issue was tried"); *see also Texas & P. Ry. v. Behymer*, 189 U.S. 468, 469 (1903); *New York Central & Hudson River R.R. v. Fraloff*, 100 U.S. 24, 31 (1879).[34] From this it inevitably followed that the denial of a motion for a new trial could not be reviewed by a federal appellate court. *See New York, L. E. & W. R.R. v. Winter's Administrator*, 143 U.S. 60, 75 (1892) ("[w]hether the verdict was excessive is not our province to determine"); *Marine Ins. Co. of Alexandria v. Young*, 9 U.S. (5 Cranch) 187, 191 (1809) ("improper in this court to determine whether the inferior court [should] have granted the motion . . . below for a new trial, upon the ground that the verdict was contrary to the evidence"); *see also Fairmount Glass Works v.*

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[34] The lower federal courts likewise followed the English common law practice. In *United States v. Wonson*, 28 F. Cas. 745, 749 (C.C.D. Mass. 1812) (No. 16,750), Justice Story held "an appeal to the circuit court should be governed by the same rules and regulations, as a writ of error, viz. – that nothing but errors of law could be examined." Accordingly, the court held, the federal appellate courts were prohibited from reexamining a jury's fact findings, or from granting a new trial. *Id.* at 750. The court described the common law writ of error, precluding appellate reexamination of a jury's fact findings, as "the invariable practice in every other circuit . . . ." *Id. See also Maddox v. Stewart*, 16 F. Cas. 361 (C.C.D.C. 1824) (No. 8,934); *Davidson v. Burr*, 7 F. Cas. 30 (C.C.D.C. 1824) (No. 3,602). On the other hand, Justice Story readily conceded that a federal trial court could grant a new trial for excessive damages. *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1,578).

Cub Fork Coal Co., 287 U.S. 474, 481 & nn.3-5 (1933) (citing cases).[35]

This federal practice precluding appellate review of a jury's fact-findings prevailed for at least 150 years and has never been repudiated by this Court.[36] *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940).[37]

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[35] *See also Louisville & N. R.R. v. Holloway*, 246 U.S. 525, 529 (1918); *Texas & P. Ry. v. Hill*, 237 U.S. 208, 215 (1915); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909); *Blintz v. United States*, 153 U.S. 308, 312 (1894); *Fitzgerald & Mallory Constr. Co. v. Fitzgerald*, 137 U.S. 98, 113 (1890); *Arkansas Val. Land & Cattle Co. v. Mann*, 130 U.S. 69, 75-76 (1889); *Newcomb v. Wood*, 97 U.S. 581, 583-84 (1878); *Henderson v. Moore*, 9 U.S. (5 Cranch) 11, 12 (1809).

[36] *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *St. Louis Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 661 (1915); *Southern Ry. v. Bennett*, 233 U.S. 80, 86-87 (1914); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-79 (1913); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 246 (1897); *Lincoln v. Power*, 151 U.S. 436, 437-39 (1894); *Wilson v. Everett*, 139 U.S. 616, 621 (1891); *Wabash Ry. v. McDaniels*, 107 U.S. 454, 456 (1883); *United States Express Co. v. Ware*, 87 U.S. (20 Wall.) 543, 545 (1875); *Mercantile Mutual Ins. Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 249 (1874); *Knickerbocker Ins. Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 269 (1873); *Fowler v. Rathbone*, 79 U.S. (12 Wall.) 102, 119 (1871); *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 281-82 (1870); *Mills v. Smith*, 75 U.S. (8 Wall.) 27, 32 (1869); *Hyde v. Stone*, 61 U.S. (20 How.) 170, 176 (1858); *Phillips v. Preston*, 46 U.S. (5 How.) 278, 289 (1847); *Zeller's Lessee v. Eckert*, 45 U.S. (4 How.) 289, 298 (1846); *Minor v. Tillotson*, 43 U.S. (2 How.) 392 (1844); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838).

[37] With the 1948 revision of the judiciary code, the Judiciary Act's explicit prohibition of reversal "for any error in fact" was removed. *See* 28 U.S.C. § 2105. However, even proponents of appellate review concede that this change was only made "to avoid any construction that matters of fact are not reviewable in nonjury cases." Reviser's Notes to Section 2105, H.R. Rep. No. 308, 80th Cong., 1st Sess. A173 (1947). *See Dagnello v. Long Island R.R.*, 289 F.2d 797, 806 (2d Cir. 1961).

D. The Permissible Scope Of Appellate Review Is Sufficient To Keep Jury Verdicts Within The Bounds Of The Law.

In its opposition to the petition for a writ of certiorari, respondent described as "frightening" the contention that the Seventh Amendment bars appellate review of jury fact-findings, and insisted such review is "necessitated by the increasing proclivity of juries to award excessive damage amounts." Brief in Opposition, at 6, 7. There is no cause for alarm. The scope of allowable appellate review is sufficient to keep jury verdicts, including damage awards, within legal boundaries.

First, respondent forgets that it may move for a new trial on grounds that the verdict is against the weight of the evidence or that the damages are excessive, and this motion will be heard by an Article III judge with lifetime tenure, who is as much a part of the independent judiciary as the Court of Appeals. Proponents of appellate review of jury fact-findings have never explained why District Judges are inadequate to the task of policing verdicts that go against the weight of the evidence.[38]

Second, because any error of law is reviewable on appeal, the Seventh Amendment allows litigants to challenge jury verdicts before the circuit courts on a wide range of grounds, such as improper admission of evidence, prejudicial statements by counsel, improper charge to the jury, misconduct affecting the jury, unfair surprise, falsified testimony or newly discovered evidence.[39] Indeed, respondent raised precisely such a challenge in this case, albeit unsuccessfully. Pet. App. 4a-5a.

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[38] The trial court's review of jury verdicts against the weight of the evidence and for excessiveness likewise provides adequate procedural due process. *Compare Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994).

[39] Where the appellate court reverses a judgment entered on a verdict for legal error, however, the proper remedy is not to enter a new judgment but to remand for a new trial. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 394 (1937).

Third, a litigant who believes evidence presented is legally insufficient to sustain a verdict can make a motion for a judgment as a matter of law (formerly a motion for directed verdict or J.N.O.V.). This Court has consistently held that a motion for judgment as a matter of law can be used to test whether an issue may properly be submitted to a jury and, consistent with the Seventh Amendment, the denial of a motion for a judgment as a matter of law is reviewable on appeal. On such review, the appellate court is not weighing the verdict against the evidence, but is applying a legal standard of sufficiency to the facts, resolving every dispute and drawing every permissible inference in favor of the nonmovant. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).[40]

Nothing prevented respondent from moving for a judgment as a matter of law in this case. Presumably, respondent's contention would have been that there was insufficient evidence as a matter of law to support an award of damages above a certain amount for some or all of the lost transparencies. Had respondent made such a motion, its denial would have been reviewable on appeal. *See, e.g., Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125, 126 (3d Cir. 1967) (defendant appealing from denial of JNOV motion on damages). Yet, respondent failed to make any motion for a judgment as a matter of law, and "[i]n the absence of such a request, we must assume that there was sufficient evidence to warrant the court in permitting the jury to draw inferences proper to be deduced from the evidence in the case." *Hansen v. Boyd*, 161

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[40] The distinction is critical for purposes of the Seventh Amendment's reexamination clause. As this Court has held, the Seventh Amendment's two provisions are separate and independent. *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277 (1870). Thus, where a jury trial is held, the reexamination clause is violated by appellate review of a jury's fact findings, even if there was no right to have the case tried by jury in the first place. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 244-46 (1897). While a motion for a judgment as a matter of law is premised on the assertion that an issue is not even properly before a jury, a motion for a new trial on the ground that the verdict is excessive or against the weight of the evidence can only be made after the verdict is rendered, and thus implicates the Seventh Amendment's reexamination clause. *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

U.S. 397, 402-03 (1896). Having failed to test the legal sufficiency of the evidence, respondent instead appealed from the denial of its motion for a new trial, thus taking advantage of the circuit court's re-weighing of the evidence against the findings of the jury. Contrary to respondent's assertion, this direct assault on the Seventh Amendment's reexamination clause is not only improper but unnecessary.[41]

III. ASSUMING *ARGUENDO* THAT THE SEVENTH AMENDMENT PERMITS APPELLATE REVIEW OF A JURY'S FACT FINDINGS, AN APPELLATE COURT SHOULD NOT SET ASIDE A VERDICT UNLESS THERE IS NO EVIDENCE TO SUPPORT IT.

The language and history of the Seventh Amendment, the unambiguous common law practice preserved by the Amendment, and a long line of this Court's decisions mandate a prohibition on appellate review of a trial court's decision not to set aside a jury's findings of fact on damages. But, as this Court has held repeatedly, even if one assumes *arguendo* that the Seventh Amendment permits appellate review of jury fact-findings, the correct standard of review would be abuse of discretion. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) (assuming the Seventh Amendment does not preclude appellate review entirely, "[i]t is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not *abuse its discretion* in refusing to grant petitioner's motion . . . for a new trial or remittitur") (emphasis supplied); *Grunenthal v. Long Island R.R.*,

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[41] Even the denial of a new trial motion may be reviewed, if the trial court's decision is premised on legal error. For example, an appellate court may reverse the denial of a new trial motion if the district court improperly believed it was without jurisdiction to consider the motion, *see Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482-83 (1933), or where the trial court improperly excluded appropriate matters from its consideration of the motion. *Mattox v. United States*, 146 U.S. 140, 147 (1892). In such a case, again the appropriate remedy is to reverse for a new trial. *Id.* at 153.

393 U.S. 156, 160 (1968) (same); *Neese v. Southern Ry.*, 350 U.S. 77 (1955) (per curiam) (same). *See also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) (Brandeis, J.) ("Whether failure to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge *abused his discretion*, we have no occasion to determine") (emphasis supplied).

As early Circuit Court decisions exercising appellate review held, an extremely deferential abuse of discretion standard is required because, when an appellate court reviews the denial of a new trial motion

> [t]wo factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.

Taylor v. Washington Terminal Co., 409 F.2d 145, 148 (D.C. Cir.) (Skelly Wright, J.) (citations omitted), *cert. denied*, 396 U.S. 835 (1969).[42] *See also Dagnello v. Long Island R.R.*, 289 F.2d 797,

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[42] In *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-47 (8th Cir. 1961) (citations and internal quotations marks omitted), then Circuit Judge Blackmun wrote:

> [This court has] . . . stated that the excessiveness of a verdict is not a question for our consideration but rather is a matter directed solely to the discretion judgment and conscience of the trial judge on a motion for a new trial. . . . [I]n reaching this result we have referred at times to the Seventh Amendment and to the common law as it existed in 1791 upon the Amendment's adoption. . . . [I]n our opinion inadequacy or excessiveness of a verdict is basically, and should be, a

(continued...)

806 (2d Cir. 1961) ("If we reverse it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial . . .").[43]

Without further direction from this Court, however, the abuse of discretion standard inadequately defines the constraints on appellate review imposed by the Seventh Amendment.[44] Such

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42 (...continued)
matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards.

43 An abuse of discretion standard comports with the principal, repeatedly upheld by this Court, that appellate courts must pay extreme deference to determinations of trial judges when those decisions are fact-based and therefore informed by the trial judge's first hand exposure to the evidence presented at trial. *See, e.g., Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216-17 (1947); *Patton v. Texas & P. R.R.*, 179 U.S. 658, 660 (1901). Similarly, this Court has steadfastly adhered to the principle that *judge*-found facts should be insulated from appellate review in all but the most exceptional of circumstances. In considering the proper role of an appellate court in reviewing a Fed. R. Civ. P. 52 motion, this Court explained that "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). *See also Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Snyder v. United States*, 350 U.S. 906 (1955) (per curiam) (reversing Court of Appeals and reinstating size of judgment awarded by District Court). Although the Seventh Amendment is not implicated when an appellate court reviews facts found by a judge, sound jurisprudence requires at least as much deference be given to facts found by a jury and upheld by a trial judge as is given to facts found by a trial judge.

44 Even when claiming to apply an abuse of discretion standard, appellate courts have on occasion shown remarkably little deference to the findings of the district court, and have remarkably overestimated their ability to re-evaluate facts. *See* Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury* (continued...)

review must be limited to whether the trial court abused its discretion by refusing to set aside a verdict for which there is no support in the evidence.

In *Neese v. Southern Ry.*, 350 U.S. 77, 78 (1955), this Court explained that the power to review the excessiveness of a verdict (if it exists at all) is narrowly limited to whether there is any support in the record to support the verdict. *Id.* ("we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, *as an abuse of discretion*. For apart from that question, as we view the evidence we think that *the action of the trial court was not without support in the record*" (emphasis supplied)). *See also Hiltgen v. Sumrall*, 47 F.3d 695, 703 (5th Cir. 1995) ("We will reverse the trial court's denial of a motion for a new trial only when there is a clear showing of an abuse of discretion. . . . To show an abuse of discretion the defendant would have to show an absolute absence of evidence to support the jury's verdict.") (citations and internal

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44 (...continued)
Verdicts, 1989 Wis. L. Rev. 237, 320 n.318, 329-33, n. 376 ("Schnapper"). For example, in reducing as "flagrantly extravagant" $112,000 for unconstitutional strip search, the court of appeals in *Joan W. v. City of Chicago*, 771 F.2d 1020, 1021-25 (7th Cir. 1985), neglected to mention numerous critical facts set out in the written opinion of the district judge upholding the verdict, Memorandum Opinion and Order, May 22, 1984, No. 83 C 327 (N.D. Ill.), including the nature of the body cavity search, the aggressiveness and hostility of the matrons conducting the search, and the "highly insulting and antagonistic manner" used by the City's attorney in cross-examining plaintiff. *See also* Schnapper, *supra*, 1989 Wis. L. Rev. at 325-27, *comparing Deackle v. John Graham & Sons*, 756 F.2d 821, 827-32 (11th Cir. 1985) (ordering conditional remittitur based on re-calculation of plaintiff's future earnings over a thirty-six year period without accounting for merit or seniority increases and without adjusting for inflation) *with Neese v. Southern Ry.*, 350 U.S. 77 (1955), *rev'g, Southern Ry. v. Neese*, 216 F.2d 772, 775-76 (4th Cir. 1954) (similarly flawed recalculation of future earnings reversed by Supreme Court).

As Justice Black recognized, "[o]ur duty to preserve this one of the Bill of Rights may be peculiarly difficult for here it is our own power which we must restrain." *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J. dissenting).

quotation marks omitted); *Collins v. Seaboard Coast Line R.R.*, 675 F.2d 1185, 1197 (11th Cir. 1982) (same); *Harris v. Zurich Ins. Co.*, 527 F.2d 528, 530 n.1 (8th Cir. 1975) (same). *Cf. Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (in conducting sufficiency of the evidence review "[o]nly when there is a *complete absence of probative facts to support the conclusion reached* does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, . . . [t]he appellate court's function is exhausted, . . . it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (emphasis supplied)).

Accordingly, to assess whether the trial court abused its discretion, the appellate court need only determine whether any evidence was presented at trial which supports the jury's findings. An appellate court may not re-weigh conflicting evidence and substitute its assessment of that evidence for the jury's; it is in no position -- as a matter of constitutional law or practical reality -- to re-evaluate the credibility and persuasiveness of witnesses it never saw nor heard.[45]

In this case, the presence of evidence at trial supporting the jury's finding on damages is undeniable. At the close of trial, the jury was instructed to consider: "the content and subject matter of the lost slides;" the "ability[,] experience and knowledge of the photographer;" the "reputation of the photographer;" the "prior licensing fees collected"; the "nature of his efforts to exploit the economic value of [the] transparencies;" the "nature of the demand in the market for the use of pictures of this particular type and content;" the "potential competition or alternative sources of similar

[45] In this context, abuse of discretion review also requires that the discretion be exercised in the first instance by the district court. An appellate court having found an abuse of discretion in the denial of a new trial motion may not proceed to set a specific remittitur; it must remand to the district court to make that determination in light of the appellate court's analysis of the new trial issue. Assessing a particular amount of remittitur invites and requires a detailed evaluation of the evidence at trial -- an evaluation the trial judge is uniquely qualified to conduct.

or substitute photography;" the "potential use of the slides for the purposes of writing a book;" and "the entire bundle of rights involved in the photographs . . . [including] the life of the copyright." App. 304-06.

Over a three-day period, the jury and Judge Brieant saw and heard evidence going to each of these factors. The "content and subject matter of the lost slides" were established by: Mr. Gasperini's testimony of the often life-threatening circumstances under which the photographs were taken during a seven-year period under conditions impossible to recreate, App. 177; a meticulous written explanation, given to the jury, of the subject matter of each one of the lost transparencies; and a video produced by the respondent that contained reproductions of the lost images.

The "ability, experience and knowledge of the photographer," as well as his "reputation," was established not only by explanations of how Mr. Gasperini used his language skills and journalistic ability to obtain particular shots, App. 150, 217, but also by the producer of *Conflict in Central America*, Susan Green, who testified that the lost transparencies were "wonderful," App. 65, by Jane Kinne, who described Mr. Gasperini as a "first class photojournalist," App. 216, by photo editor William Kuebler, who described Mr. Gasperini's work as of the highest quality in the industry, App. 208, and even by the Center's President, William Goodman, who sought out Mr. Gasperini's work because he was the only photographer the Center knew who had collected a body of work on war in Central America. App. 122. Moreover, the jurors themselves were able to judge Mr. Gasperini's abilities by viewing the videotape reproductions of a third of his lost transparencies, Pl. Ex. 10; App. 46-47, and by reviewing numerous examples of Mr. Gasperini's photographs taken in other parts of the world. Pl. Ex. 18; App. 153-57.

The jury also heard evidence that, although during his seven-year period in Central America Mr. Gasperini was engaged in creating photographs rather than marketing them, he had earned approximately $10,000 from photography while in Central America, App. 178, 181-2, 192, 194-5; that there was a demand in the

market for images of the "type and content" of Mr. Gasperini's, *e.g.*, App. 239; that Mr. Gasperini had specific plans to market a book featuring his best work from the now lost transparencies, App. 175, 272; and that each of Mr. Gasperini's photographs would have had a recurrent value over the remaining 94 years of his copyright, App. 228-29, 268-69. Based on her estimation of Mr. Gasperini's ability as a photographer, the subject matter of the photographs, and of the circumstances under which they were taken, Jane Kinne valued the lost transparencies at $1500 each. App. 228. It cannot credibly be argued that the jury's finding that the transparencies were worth $1500 each had no support in the record.

Indeed, the Court of Appeals reached no such conclusion in this case. Instead, after no more than a cursory reference to Judge Brieant's denial of the new trial motion, the appellate court ignored most of the factors the jury had been instructed to consider in determining damages,[46] ignored the fact that the jury had an opportunity to see reproductions of many of the lost transparencies, reexamined a selective *part* of the evidence, and decided it was not as persuasive as the jury thought. Based on this re-weighing of part of the evidence, the Court of Appeals substituted its judgment for that of the jury.[47]

Despite this Court's pronouncements in *Browning-Ferris*, 492 U.S. at 279, *Grunenthal*, 393 U.S. at 159, and *Neese*, 350 U.S. at 78, the Second Circuit in this case never mentioned, much less

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[46] An appellate court reviewing a new trial motion must examine the evidence in light of the law as presented to the jury. *Cf. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364 (1962) (reversing Court of Appeals and reinstating jury's verdict on liability because appellate court did not consider a second basis for liability that appeared in the jury charge).

[47] Ironically, the Second Circuit acknowledged the difficulty inherent in this type of review. "We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. This case is particularly difficult, since neither we nor the jury was able to see the lost transparencies themselves. In the end, it is not our job to impose a specific award of damages -- that task is for the jury." Pet. App. 9a.

followed, an abuse of discretion standard in reviewing the trial court's denial of respondent's Rule 59 motion. Before improperly employing a standard of review based on New York State law, the Second Circuit in this case asserted that the "traditional" federal standard of appellate review is to reverse a jury's verdict for excessiveness when it "shock[s] the conscience of the court." Pet. App. 8a (citation omitted). Similarly, a number of circuits hold that a jury verdict will be overturned when it represents a "monstrous or shocking injustice."[48] *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994); *see also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2820, at 213-14 & n.25 (2d ed. 1995) (citing cases). A number of Circuits attempt to reconcile the two types of review (abuse of discretion and shocking or monstrous) by explaining that a District Judge's decision to uphold a verdict that the Circuit Court finds shocking or monstrous is an abuse of discretion. But this tautology cannot change the fact that appellate "shocks the conscience" review can only result in an improper subjective reevaluation of the facts. Phrases such as "shocks the conscience," "monstrous" or "grossly excessive," are inherently malleable and subjective. As Justice Kennedy has commented, "[a] reviewing court employing [a "grossly excessive"] formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award . . . This type of review, far from imposing meaningful, law-like constraints on jury excess, could become as fickle as the process it is designed to superintend." *TXO Production Corp. v. Alliance Resources Corp*, 113 S. Ct. 2711, 2725 (1993) (Kennedy, J. concurring in part and concurring in the judgment). *See also In re Air Crash Disaster Near New Orleans, La.* 767 F.2d 1151, 1156 (5th Cir. 1985) ("shocks the

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[48] A number of Circuits, including the Second Circuit, review the evidence to determine whether the verdict "shock[s] the conscience of the court," Pet. App. 8a, or other similar formulations. *See, e.g., Velasquez v. Figueroa-Gomez*, 996 F.2d 425, 428 (1st Cir.), *cert. denied*, 114 S. Ct. 553 (1993) (grossly excessive, inordinate, shocking to the conscience); *Trytko v. Hubell, Inc.*, 28 F.3d 715, 727 (7th Cir. 1995) ("monstrously excessive"); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580 (Fed. Cir. 1992) ("grossly excessive or monstrous.")

conscience" formula for appellate review "cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation." (citation omitted)).

Nearly all of these formulations, including the Second Circuit's,[49] can be traced back to this Court's holding in *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96 (1950), where at the very end of an opinion devoted entirely to other issues the Court stated that it "agree[d] with the Court of Appeals that the amount of damages awarded by the District Court's judgment [was] not monstrous in the circumstances of this case."[50] *Id.* at 101. The influence of this statement in shaping circuit practice and standards when exercising appellate review has been widely criticized. *See* DeParcq & Wright, *Damages under the Federal Employer's Liability Act*, 17 Ohio St. L.J. 431, 471-72 (1956) (critical of

[49] The Second Circuit in this case cites *Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989), which cites *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2d Cir. 1984), which cites *United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975), which cites *Caskey v. Village of Wayland*, 375 F.2d 1004, 1007 (2d Cir. 1967), which cites *Wooley v. Great Atl. & Pac. Tea Co.*, 281 F.2d 78, 80 (3d Cir. 1960) ("so grossly excessive as to shock the judicial conscience"), which cites *Thomas v. Conemaugh & Black Lick R.R.*, 234 F.2d 429, 434 (3d Cir. 1956), which cites *Trowbridge v. Abrasive Co. of Philadelphia*, 190 F.2d 825, 830 n.10 (3d Cir. 1951), which cites *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96 (1950).

[50] Perhaps the word "monstrous" used by this Court in *Affolder* could be a workable formula if it were interpreted as it was originally articulated by the court in *Beardmore v. Carrington*, 2 Wils. 244, 95 Eng. Rep. 790 (C.P. 1764) ("the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush."). All mankind would presumably exclaim against a verdict if there was absolutely no evidence of any kind to support it. *See also* Schnapper, 1989 Wis. L. Rev. at 341-42 *comparing Beardmore, supra* (upholding jury verdict of 1,000 pounds [equivalent to $1 million 1988 dollars] for improper imprisonment of six days and government seizure of private papers), *with Taliferro v. Augle*, 757 F.2d 157, 159-62 (7th Cir. 1985) (setting aside verdict of $47,000 and ordering conditional remittitur of $25,000, for improper imprisonment of political dissident for several days and the destruction and seizure of plaintiff's manuscripts).

circuit court reliance on *Affolder* because "(a) the court of appeals had said nothing about the verdict as being 'monstrous' or otherwise excessive; (b) the railroad had not claimed in the Supreme Court that the damages were 'monstrous' or other wise excessive; and (c) a casual adjective in an opinion devoted to other issues seems an unusual way of overruling a long line of authorities.").

If any appellate review of jury fact-finding can be legitimate under the Seventh Amendment, such review may only take place under an abuse of discretion standard; and if "abuse of discretion" is to have any meaning, it must not allow a subjective reevaluation of the evidence by the Court of Appeals. A trial court may not be found to have abused its discretion in denying a motion for a new trial challenging the size of a jury's verdict unless there is a complete absence of evidence to support the size of the verdict.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court and the jury's verdict reinstated.

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